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SUPREME COURT, U.S.
JAMES R. BROWNING

No. [redacted] 115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

[redacted]

v.

[redacted]

Petition for a Writ of Certiorari to the Circuit Court of Mercer County, West Virginia and/or to the Supreme Court of Appeals of West Virginia

BRIEF FOR THE RESPONDENT IN OPPOSITION

[redacted]
[redacted]
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 713

CARL STILL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Respondent*

Petition for a Writ of Certiorari to the Circuit Court of Mercer County, West Virginia and/or to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia, is unreported; it is printed in the Appendix to the petition for Certiorari. However, the opinion of the Circuit Court appears on pages 1409-1422 of the transcript of the proceedings in the Circuit Court.

The judgment of the Supreme Court of Appeals of West Virginia is also unreported. A copy of the order refusing to grant petitioner a writ of error and supersedeas to the judgment of the Circuit Court of Mercer County, West Virginia, appears in the Appendix to the petition for Certiorari. The refusal to grant the writ of error and supersedeas was unanimous. Under the rules of the Supreme Court of Appeals of West Virginia, had any judge voted in favor of granting the writ of error and supersedeas, this would have appeared in the order of refusal.

QUESTIONS PRESENTED

1. Was the evidence sufficient to justify the jury in finding that respondent was negligent.

2. Did the trial court err in directing a verdict in favor of respondent where the evidence showed without substantial conflict (a) that petitioner, prior to his employment by respondent, had received a medical discharge from the United States Army, and a pension, for second-degree, severe spondylolisthesis, which disabled petitioner from performing effective military service; that petitioner had been seriously disabled by rheumatism, which confined him to bed for several months, affecting his back, and other parts of his body; that petitioner had sustained a personal injury in an automobile accident which substantially aggravated his low back condition; and that seven months prior to his employment by respondent, petitioner had applied to the Veterans Administration for hospitalization for such low back disability, (b) petitioner, by means of false answers in his written application for employment, and to respondent's medical examiner,

fraudulently concealed his prior military service and medical discharge; his application for hospitalization for his low back condition; the fact that he had a severe spondylolisthesis; and had been seriously disabled with rheumatism, and by injuries sustained in an automobile accident, (c) respondent's medical examiner, in reliance upon the answers given by petitioner in said Application for Employment, and to said medical examiner, approved petitioner for employment by respondent, (d) had petitioner given truthful answers to the questions contained in said application for employment, and to said medical examiner, his application for employment would have been rejected, (e) petitioner, due to his physical condition, was not employable, as a railroad brakeman, and no medical examiner would have been justified in approving petitioner for such employment, (f) respondent did not discover that petitioner had a spondylolisthesis, or any other disability, until subsequent to petitioner's alleged injury January 23, 1958, (g) the condition which petitioner had while in the Army, and for which he was given a medical discharge, was precisely the same condition he had at the time of the trial, (h) there was a direct causal connection between petitioner's false and fraudulent representations to respondent, and the injuries alleged to have been sustained by petitioner on January 23, 1958.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT

The petitioner's Statement contains many inaccuracies, and omits much that is necessary for a proper understanding of the case. We will, in our Statement of Facts, correct these inaccuracies and supply the omissions.

KIND OF ACTION AND PROCEEDINGS IN TRIAL COURT

This is an action instituted by petitioner against respondent under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51-8, to recover for personal injuries alleged to have been sustained by petitioner in respondent's west railroad yard at Bluefield, West Virginia, on January 23, 1958, when an empty coal car on which plaintiff was riding, while engaged in a switching operation, was coupled to by a following train of sixty-nine empty coal cars. Petitioner claimed that the above mentioned coupling resulted in a severe spondylolisthesis which totally and permanently disabled him from performing his duties as a yard brakeman.

Petitioner's contention with reference to his alleged injury is summed up in the following statement made by his attorney at a pre-trial conference held in this action on August 10, 1959:

> "Now, we claim that in that accident he (petitioner) sustained a very serious and permanent injury. We claim that he had the fifth, or last, vertebra in his backbone, which attached onto the sacrum, *knocked forward and about half displaced*, or better, on the sacrum, thereby affecting the nerves in his spinal cord and his backbone." Tr. 1434.

At the same pre-trial conference petitioner's attorney stated that prior to January 23, 1958, petitioner had had no back injuries or back disabilities, and "had never been to a doctor". Tr. 1439-1440.

At the trial respondent pleaded the general issue and filed its Special Plea No. 1, and its Amended Special Plea No. 1, which Pleas alleged in substance that in

petitioner's written application for employment with respondent dated July 24, 1951, and in response to questions propounded to petitioner by respondent's medical examiner at that time, petitioner had made certain false and fraudulent answers with respect to his health and physical condition, his previous accidents, injuries and illnesses, and his past military service, and medical discharge therefrom.

The said Special Pleas filed by respondent further alleged that for many years prior to his employment by respondent in July, 1951, petitioner had suffered with a severe spondylolisthesis; that petitioner had been discharged from the United States Army on January 31, 1946, by reason of said spondylolisthesis—a medical discharge—and had received a pension for such disability from the United States Government for a period of approximately three years; that petitioner had suffered from a severe attack of rheumatism which caused disability of his back, and had been involved in an automobile accident in which he had injured his back, and which had disabled him.

Respondent contended at the trial that the low back condition known as spondylolisthesis, which petitioner had while in the United States Army in 1945 and 1946, and for which he was discharged, and for which he received a pension, was precisely the same condition which petitioner had at the time of the trial, and which petitioner sought to attribute to the alleged accident of January 23, 1958.

Petitioner objected to the filing of respondent's Special Plea No. 1, and respondent's Amended Special Plea No. 1, but the Court overruled said objections and permitted said Special Pleas to be filed.

Thereupon the case was tried before a jury and when all of the evidence had been introduced, respondent moved the Court to direct the jury to find a verdict in favor of respondent, on the ground and for the reason that petitioner's employment with respondent had been procured by fraudulent representations with respect to petitioner's health, physical condition, prior illnesses and accidents, prior Army service and medical discharge, and that such fraudulent representations had a direct causal connection with the injuries with which petitioner then claimed to be suffering.

The Court sustained respondent's motion to instruct the jury to find for respondent on the ground that petitioner had fraudulently procured his employment with respondent, and the Court's opinion appears on pages 1409-1421 of the transcript of the proceedings in the trial court. On page 1421 of said transcript, the Court said:

> "Now, you gentlemen (petitioner's attorneys) were taken as much by surprise in this case as all these doctors, (doctors to whom petitioner had made false statements pertaining to his previous low back disability) and doctors from the Railroad. This man didn't even tell you his back—he had a bad back condition. It is very obvious that you didn't know that until very late in this trial. I do like my lawyers and have a lot of hesitancy in directing any of these verdicts, but I don't have any sympathy for Carl Still in this case because I think he has lied completely all through this case."

STATEMENT OF FACTS

1. PETITIONER'S EMPLOYMENT BY RESPONDENT AND HIS ALLEGED INJURY OF JANUARY 23, 1958

Petitioner was employed by respondent as a yard brakeman on July 24, 1951, after having filled out, *unassisted*, and signed, a written Application for Employment (Tr. 640, 1060-1) and having been examined by respondent's medical examiner. During this examination the medical examiner asked petitioner certain questions pertaining to his previous military service, medical discharge, illnesses, injuries, etc., and wrote down petitioner's answers on a card furnished for that purpose, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708; R. 1679). The Application for Employment referred to was admitted in evidence as Defendant's Exhibit No. 4 (Tr. 641; R. 1678).

Petitioner continued working for respondent as a yard brakeman until January 23, 1958, the date of his alleged injury, except during the period October 1956 to November 18, 1957. In October, 1956, petitioner was dismissed from service for deserting his crew (Tr. 493). He was held out of service by respondent until petitioner's labor organization, The Brotherhood of Railroad Trainmen, intereeded for petitioner. It was then agreed that petitioner would be *reinstated* to his job, with *seniority rights unimpaired*, but would not receive pay for time lost. (Tr. 1165-6, 1279, 1283-5, 1289). The agreement under which petitioner was reinstated is set forth in a letter from H. C. Wyatt, respondent's Vice President and General Manager, to K. H. Jones, dated November 8, 1957, Plaintiff's Exhibit No. 21, Tr. 1326, 1671. When petitioner was reinstated he was not required to file an application

for employment, and was not required to, and did not, submit to a physical examination (Tr. 1242, 1287). He was, however, required to have his eyes and hearing examined (Tr. 1240-2, 1287). See record of examination, Defendant's Exhibit No. 32 (Tr. 1242; R. 1706). After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951 (Tr. 1289).

Although petitioner testified that he was a regular worker and never lost any time from work on account of sickness or disability (Tr. 731-3), and that he worked eight hours a day and "five days every week" and frequently worked "overtime" (Tr. 576), and had no difficulty performing his duties as brakeman from 1951 to January 23, 1958, the date of his alleged injury, it appears from petitioner's work record from July, 1951, to February, 1958—Defendant's Exhibit No. 29 (Tr. 1068; R. 1703)—that during said entire period that petitioner was a very *irregular* worker, and lost many days in nearly every month during said period by reason of sickness, or other unexplained absences from work. In many cases petitioner's work record showed merely that petitioner was "off by permission". Petitioner did not attempt to explain why he lost so much time from work by reason of sickness, or why he was "off by permission" so frequently.

Petitioner had been employed by respondent on two previous occasions. On May 25, 1943, petitioner, having applied to respondent for work as a track laborer, was examined by Dr. J. C. Gordon, respondent's medical examiner, and was approved for such employment. During said examination Dr. Gordon asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in petitioner's answers

on a card furnished by respondent for that purpose. Defendant's Exhibit No. 8 (Tr. 721; R. 1682). However, petitioner worked only one day during the first half of June, 1943, earning $8.80 (Tr. 1002). He quit voluntarily.

Then, again, on September 27, 1948, petitioner applied to respondent for employment as section laborer, and at that time filled out and signed a written Application for Employment—Defendant's Exhibit No. 6 (Tr. 711; R. 1680). On the same date petitioner was examined by Dr. Roy E. Christie, respondent's medical examiner. Dr. Christie asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in the answers on a card furnished by respondent for that purpose—Defendant's Exhibit No. 7 (Tr. 718; R. 1681). Petitioner reported for work on September 29, 1948, at 7:00 o'clock A.M. and worked three hours and quit (Tr. 1002-3). Petitioner remembered making only *one* application for employment. He testified that respondent offered him a job, but "I didn't want a job like that. I wanted a job as a brakeman" (Tr. 720).

At the time of petitioner's alleged injuries—January 23, 1958, at 12:30 A.M.—petitioner was employed by respondent as a yard brakeman in respondent's west yard at Bluefield, West Virginia.

Prior to petitioner's alleged injury, he and several of respondent's other employees were engaged in classifying cars—breaking up a train of empties and placing them upon the classification tracks. The west yard of respondent declines toward the west and cars and trains could travel by gravity in a westerly direction.

At the time of petitioner's alleged accident, petitioner and the other brakeman were engaged in break-up and classifying a train of sixty-nine empty cars. A steam locomotive, operated by Engineer A. N. Davis, was on the east end of the train. As the train proceeded slowly in a westerly direction, the brakemen, sometimes referred to as car cutters, would cut off one, or more, cars, from the west end of the train, and a brakeman would ride each car, or cut of cars, down to the classification tracks—twelve in number—and place same upon the proper tracks. The cars traveled by gravity toward the west. It was not customary, when there were a sufficient number of brakemen to ride the cars to the classification tracks, to stop the train as each car, or cut of cars, was cut off from the train (Tr. 282, 1009). Ordinarily when the car, or cut of cars, was cut off from the train, it would drift on down the track away from the train which it had been cut off. There were sufficient riders at the time of petitioner's alleged accident, and therefore it was not intended that the train would be stopped as each car, or cut of cars, was detached (Tr. 1009).

As the train of sixty-nine empties moved slowly westward at a speed of approximately three or four miles per hour—the usual and customary speed during such switching operations (Tr. 281-2, 348-9, 1008-9)—petitioner was directed by Conductor T. A. Taylor, Jr. to get on the car in question and take it to the shop track (Tr. 500). Cars needing repairs are placed on the shop track. Petitioner got on the western most car on the train and mounted the brake step on the east end of the car, and applied the brake (Tr. 510), and petitioner's car was cut off from the train by George A. Saunders, Jr., another brakeman, and the

car drifted downgrade toward the west, and away from the train from which it had been uncoupled (Tr. 367, 519-524).

However, for some unknown reason, the train began to overtake the car, and when Conductor Taylor observed this, he gave Engineer Davis a "red board", which was the signal to stop (Tr. 1009-1010). Before Engineer Davis could stop the train, however, it coupled to the car on which petitioner was riding and petitioner claims that the coupling of the train to the car on which he was riding, threw him against the end of the car and injured him.

After the car in question was cut off to petitioner, it traveled for approximately three or three and one-half car lengths before the train overtook it and recoupled to it (Tr. 523). The distance separating the west end of the train and the car on which petitioner was riding, was at no time more than ten or fifteen feet (Tr. 229-231). George A. Saunders, Jr., a witness for petitioner, testified that "the train followed it (the car) and *gradually* caught up with it" (Tr. 375).

At the time the train coupled to the car on which petitioner was riding, petitioner was standing on the brake step on the east end of the car, looking toward the west. Petitioner admitted that after his car was cut off, and started moving west, that he did not continue to watch the train, although he knew that the train was moving in a westerly direction at the time the car was cut off, and knew that the train was following him. (Tr. 517, 735-7, 739, 740-3).

When petitioner's witness, Harry S. Manns, Jr., saw that the train was overtaking the car on which petitioner was riding, he ran to the car to prevent it from

coupling. The coupling apparatus could be operated without going between the cars. However, Manns did not reach the train in time to prevent it from coupling to the car. It did not occur to Harry Manns that petitioner was in any danger, but Manns knew that if the train coupled to the car, that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (Tr. 530-3).

Petitioner's witness, Orrin K. Trigg, testified that he was on the train in question at the time it coupled to petitioner's car; that he was about three or four cars to the west of the car on which petitioner was riding; that the coupling of the train to petitioner's car almost knocked him, Trigg, off of the car on which he was riding. However, Trigg was not thrown from the car and was not injured in any way.

The evidence also disclosed that all of respondent's brakeman are instructed in switching operations of this kind to keep a watch to the front and the rear, as it often happens that a train from which a car has been cut off will overtake and recouple to the car. In fact, most of the witnesses who testified on the subject said that it was the custom and practice of brakemen in situations of this kind to look both to the front and to the rear (Tr. 293-4, 297, 301, 356, 517, 522, 1017-18, 1162, 1306). As has been pointed out, petitioner admitted that he knew that the train in question was following him, but that he did not continue to watch the train (Tr. 735-7, 740, 743).

It further appeared from the evidence that respondent's rules in effect at the time of petitioner's alleged injury permitted a train traveling at a speed of four miles per hour to couple to a *standing car*; that this method of coupling was customary and perfectly safe,

and that it was not customary for the brakeman to leave the cars during such coupling operations (Tr. 1155-7, 1306-7).

The evidence further showed that whenever a train such as this stops, there is always "slack action"; that this slack action cannot be prevented, and that the brakemen can hear the slack running out in ample time to protect themselves (Tr. 1018-19, 1307-8). There is no evidence to the contrary.

Ben G. Lilly, respondent's Terminal Train Master at Bluefield, West Virginia, who had had many years experience on the railroad, testified that *prior* to petitioner's alleged injury, he had never heard of a brakeman being injured in a coupling operation such as this. (Tr. 1158) However, *subsequent* to petitioner's alleged injury, he did hear such complaints "from a few of our brakemen after Carl's injury * * *. No injury of any extent" (Tr. 1160).

Several of petitioner's witnesses testified that the noise of the coupling was unusually loud and that the train jerked severely. However, no damage whatever was done to either of the cars involved in the coupling operation.

Although petitioner claims that he was seriously injured on January 23, 1958, as a result of the above mentioned coupling operation, and that he thereby became totally and permanently disabled, he was seen and examined by Dr. D. L. Hosmer, an orthopedic surgeon on the staff of the Bluefield Sanitarium Clinic at Bluefield, West Virginia, on the day following his alleged injury. However, at that time petitioner did not complain to Dr. Hosmer of his *back*. The only complaint that petitioner made to Dr. Hosmer was with

reference to pain in his left hip and left thigh. Dr. Hosmer stripped petitioner and examined him, but said that his records did not indicate that he found any bruises, wounds, contusions or lacerations on petitioner's body. (Tr. 1257-1260). Dr. Hosmer had x-rays made of petitioner's left hip and left femur. No x-ray was made of the back, for the reason that petitioner was not complaining of his back at the time (Tr. 1259). Dr. Hosmer did not discover that petitioner had spondylolisthesis at the time of the above mentioned examination (Tr. 1264-5).

Harry S. Manns, Jr. and Orrin K. Trigg, two of petitioner's witnesses, testified that immediately following the alleged accident, that petitioner was complaining that he had hurt his hip and leg. No mention was made of injury to his back (Tr. 221, 344).

After the institution of this action petitioner was examined at the request of his attorney, by Dr. Roy M. Hoover, an orthopedic surgeon, and at that time petitioner advised Dr. Hoover that he had been knocked off of the car and fell down on the coupler, striking his back (Tr. 86-87). Following the alleged accident petitioner was also examined by Dr. R. R. Raub, another orthopedic surgeon, and petitioner admitted that he advised Dr. Raub that he was "knocked * * * completely off of the car" (Tr. 760).

As a matter of fact, petitioner was not knocked off of the car. He remained on the car until it stopped, and then climed down off of the car *unassisted* (Tr. 1014). When asked whether he had not advised Dr. Hoover that he had been knocked off of the car and struck his back on the coupler, petitioner said, "I have been telling different tales about where I fell. Just from what people tell me" (Tr. 752).

2. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

On July 24, 1951, petitioner, without assistance (Tr. 1060), filled out and filed with respondent, his application for employment as a yard brakeman (Defendant's Exhibit No. 4; Tr. 641; R. 1678).

This application was filed by petitioner with Frank J. Allen, a clerk in the office of the Terminal Train Master at Bluefield, West Virginia (Tr. 1060). Allen gave petitioner the application form, and, according to respondent's rule and custom, required petitioner to fill out and sign the application (Tr. 1060-1).

When the application was filled out by petitioner, and signed, Allen gave the application to petitioner with a note addressed to Dr. Harold E. Troup, respondent's Medical Examiner at Bluefield, requesting Dr. Troup to examine petitioner for employment (Tr. 1061). Allen testified that he had no reason to believe that any of the answers in the application were false (Tr. 1061).

Thereupon petitioner went to the office of Dr. Troup in respondent's Division Office at Bluefield, West Virginia, and was examined by Dr. Troup. Dr. Troup interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708; R. 1679). Dr. Troup, relying upon the truth of the answers given by petitioner, approved petitioner for employment by respondent as a yard brakeman (Tr. 1235).

Dr. Troup testified that due to the lapse of time since he examined petitioner—approximately eight years—that he had no independent recollection of examining petitioner, and had to rely on his record—the Physical Examination card—Defendant's Exhibit No. 5 (Tr. 708; R. 1679). However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner, and that this custom and practice required him to strip petitioner and examine him separate and apart from other applicants, and to require petitioner to answer the questions contained in the Physical Examination card—Defendant's Exhibit No. 5—and to record the answers as given (Tr. 1222, 1227-9).

Dr. Troup, and other officials of respondent, testified that during petitioner's employment by respondent, and prior to his alleged injury, that they had no reason to believe that he had made false answers in his application for employment, or to Dr. Troup, respondent's Medical Examiner (Tr. 1164-5, 1235, 1244, 1302-3).

Petitioner's application for employment—Defendant's Exhibit No. 4, Tr. 641, R. 1678—which was filled out, and signed, by petitioner (Tr. 640, 644-5), contains the following question and answer:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of one employer—Peerless Coal Company, Vivian, West Virginia—and stated that he had been employed by Peerless from November, 1948, to July, 1951.

The evidence shows without conflict, however, that petitioner had also been employed by Pocahontas Fuel Company (Tr. 602-3), Vera Pocahontas Coal Company (Tr. 601-3), United States Coal and Coke Company (Tr. 12-13), Winding Gulf Collieries Company (Tr. 630-1), and Koppers Coal Company (Tr. 628), but failed to disclose the names of these employers. Petitioner had worked for Pocahontas Fuel Company for one month, and then ceased work on account of "physical disability"—Defendant's Exhibit No. 19 (Tr. 834-5; R. 1693), at bottom of first page—being a statement made by petitioner to the examining physician of the Veterans Administration. Just why petitioner ceased working for the other companies above referred to does not appear, as petitioner was very vague and evasive when testifying to his employment by these various companies. Then, too, as previously shown, petitioner had also been employed by respondent in 1943 and 1948. See Defendant's Exhibit No. 6, Tr. 711, R. 1680. Defendant's Exhibit No. 7, Tr. 718, R. 1681. Defendant's Exhibit No. 8, Tr. 721, R. 1682.

The application signed by petitioner—Defendant's Exhibit No. 4, Tr. 641, R. 1678—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge*".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

It is true that petitioner received an Honorable Discharge, which was admitted in evidence as Defendant's Exhibit No. 3 (Tr. 620; R. 1677). However, on the

back of the Honorable Discharge appears the following:

> "40. Reason and authority for separation Certificate of Disability for Discharge. U P Section I AR 615-361."

Petitioner admitted, however (Tr. 488, 619-20, 649) that when he was discharged from the Army on January 31, 1946, that he received a CERTIFICATE OF DISABILITY FOR DISCHARGE, and this Certificate was admitted in evidence as Defendant's Exhibit No. 12 (Tr. 821; R. 1686), and reads in part as follows:

> "7. After careful consideration of all information obtainable and a critical examination, we find this individual unfit for military service because of:
>
> Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbo sacral junction. Manifested by chronic pain in lower back. Soldier cannot be rehabilitated to perform effective military service. Will be discharged to own care."

As above mentioned, petitioner admitted that when he was released from the Army, that he received a Certificate of Disability for Discharge. We quote from petitioner's testimony:

> "Q. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. And when did you get out?
> A. I got out January 31, 1946.
> Q. What type of discharge did you receive?
> A. C.D.D.
> Q. What does that mean?
> A. It is a certificate of disability for discharge". (Tr. 488).

* * *

"Q. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?

A. Yes, sir.

Q. After you got out of Camp Beale?

A. Yes, sir.

Q. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge?

A. Yes, sir." (Tr. 619-620).

* * *

"Q. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?

A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check or something. * * *". (Tr. 648-9).

The application in question—Defendant's Exhibit No. 4, R. 1678—also contained the following question and answer:

"Q. 14. Have you ever been injured? If so, when and at what place. No."

This answer was false. The evidence clearly shows, and petitioner *admits*, that petitioner was involved in an automobile accident in 1941 or 1942, in which he injured his side and back, and petitioner testified that this injury was the cause of his discharge from the Army. See petitioner's testimony, Tr. 614, 619, 622-5, 645-6, 714-15, 723, 725-6, 728-9, 760.

Also see Defendant's Exhibit No. 18, Tr. 833, R. 1692, entitled ABBREVIATED CLINICAL RECORD, FORM 55 A-1, Medical Department of United States Army, consisting of nine pages, from which we quote:

"In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees, and back. Heart flutter. Since this time has had intermittent back pain, made worse by wet, cold weather. Long periods of standing or walking, or carrying wts. will cause pain. Complete physical examination is negative, except for the following:

In 1941, in automobile accident, acquired painful back, had to sleep in special position on abdomen for 3 months because of pain."

All of the foregoing appears on page 1 of the Exhibit.

We quote from page 6 of the same Exhibit:

"Patient presents a history of severely painful back which dates back to 1941. Nearly all ranges of back motion are limited and corresponding limitation of activity.

"Working diagnosis or impression: Spondylolisthesis, 2nd degree, severe, secondary to congenital defects of lumbo-sacral junction."

We also quote from page 9 of said Exhibit, under RADIOLOGIC RECORD:

"The fifth lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to ½ of the anterior posterior diameter of the body of the vertebra, indicative of spondylolisthesis".

This is exactly the same condition that petitioner had at the time of the trial of this case (Tr. 53, 664, 678-9).

The Physical Examination card prepared by Dr. Harold E. Troup on July 24, 1951, when he examined petitioner for employment—Defendant's Exhibit No.

5 (Tr. 708, R. 1679)—contains the following questions and answers:

> "Have you ever had: * * *
>
> Rheumatism:—No.
> A medical Discharge from the Military Service: No. (Honorable).
> Have you ever had a long or serious illness: No.
> What injuries have you ever received: No.
> Have you ever had Tumor, Ulcer, Physical Defect, or been operated upon? No."

All of the foregoing answers were false. Petitioner admitted that prior to his employment by respondent, that he had had a very severe attack of rheumatism which confined him to his bed for many months, and was involved in an automobile accident in 1941 or 1942, and that the rheumatism and personal injuries were the cause of his medical discharge from the United States Army (Tr. 614, 645-6, 714-15, 723, 725-6, 728-9, 759-60).

Also see Defendant's Exhibit No. 18, Tr. 833, R. 1692, ABBREVIATED CLINICAL RECORD, FORM 55 A-1, Medical Department of United States Army, page 3, which reads in part as follows:

> "History of the present illness: Patient states his back first bothered him in the summer of 1942. States he was bedfast for three or foursmonths, his complaint was diagnosed as rheumatism, he contends it was in all of his joints. Since that time his back has given him trouble. Patient states that long walks or long standing gives him constant and severe pain. His back has always given him some pain on standing."

We also call the Court's attention to Defendant's Exhibit No. 20 (Tr. 836, R. 1694), from which we read:

> "History: In 1941 this veteran had inflamatory rheumatism involving joints over the body. He was confined at that time for four months, and following recovery from this condition, he first complained of pain and weakness in the lower back. Sometime later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945, and was given a *medical discharge* in January 1946, having spent about one month of his time in the hospital, because of the complaint of back and weakness in the lower spine and in the right rib cage".

The answer to the effect that petitioner had not received a medical discharge from military service was likewise completely false, as it is entirely clear that petitioner did receive such medical discharge and *knew* that he had received it. See Defendant's Exhibit No. 12; Tr. 821; R. 1686, and petitioner's testimony (Tr. 488, 620, 649).

We also call attention to Defendant's Exhibit No. 13, Tr. 824, R. 1687, entitled Veterans Application for Pension or Compensation, which reads in part as follows:

> "3. Nature of disease or injury on account of which claim is made and date each began.
>
> Heart flutters, rheumatism in my back and where my bones join together (last part of 1942), pains in my right side, come from where I had my ribs broken (last of 1941), has got bad since I have been in the Army".

It is quite clear from this Application that petitioner was claiming a pension for disability due to

rheumatism since 1942, and personal injuries sustained in 1941.

Pursuant to the Veterans Application for Pension or Compensation filed by petitioner, the Veterans Administration, on March 21, 1946, wrote petitioner that he had been awarded a pension for disability resulting from *spondylolisthesis*. See Defendant's Exhibit No. 16, Tr. 831, R. 1690. Petitioner did not deny that he received and understood this letter, and admits that he received the pension. Later, on July 20, 1948, this pension was discontinued for the reason that there had been no "superimposed injury" on petitioner's "congenital defect during service", and "that in the absence of superimposed injury or active pathology, service connection by way of aggravation may not be granted for such developmental abnormality". See Defendant's Exhibit No. 17, Tr. 832, R. 1691.

The answer appearing in Defendant's Exhibit No. 5 (Tr. 708, R. 1679) to the effect that petitioner had never had a "physical defect", was likewise false, as it was clearly shown that petitioner has had a severe spondylolisthesis since prior to his induction into the Army in 1945.

Dr. Harold E. Troup testified that if, when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, illnesses and disabilities, and his Army service and medical discharge, that he would not have recommended petitioner for employment as a yard brakeman (Tr. 1230-5), and that petitioner would not have been employed (Tr. 1244-5).

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945,

and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe spondylolisthesis is easly injured. See testimony of Dr. W. Gayle Cratchfield (Tr. 671-2), Dr. Roy Hoover (Tr. 91-2), Dr. Richard Fisher (Tr. 855), Dr. Harold E. Troup (Tr. 1230-4). Dr. Hoover testified as follows:

> "In pre-employment x-ray study, if I saw a condition that looked like this (x-ray of petitioner's low back), I would advise against that man working as a brakeman, because there is too much possibility of him getting a symptomatic one *even in the ordinary activities of braking, not with any accident at all*". (Tr. 92).

The testimony of these doctors is not denied, and it is quite clear that if in July, 1951, Dr. Troup had known the true facts concerning petitioner's physical condition and past medical history that he would not have been justified in recommending petitioner's employment.

At the trial of this case petitioner contended that his spondylolisthesis was readily discoverable on medical examination and that if Dr. Troup did not discover his condition, that he should have done so. The same contention is made on page 7 of the petition for certiorari.

However, Dr. Troup testified that he gave petitioner a "screening examination" (Tr. 1226, 1246) and that he did not discover petitioner's condition.

It also appears that petitioner had taken, and *passed*, numerous physical examinations, prior to his exami-

nation by Dr. Troup, and apparently none of the examining physicians discovered petitioner's condition.

Petitioner was examined before induction into the Army (Tr. 604). He was also examined by Dr. D. L. Hosmer on the day following his alleged injury, but Dr. Hosmer did not discover his spondylolisthesis (Tr. 1257-9). Petitioner also passed physical examinations for employment by Peerless Coal and Coke Company (Tr. 489-90), Vera Pocahontas Coal Company (Tr. 601-3), Pocahontas Fuel Company (Tr. 627-8), United States Coal and Coke Company (Tr. 12-13), Koppers Coal Company (Tr. 628), and Winding Gulf Collieries Company (Tr. 630-1), and, according to his testimony, petitioner actually performed heavy work for all of these companies, except Winding Gulf.

Therefore, it is understandable why Dr. Troup, in giving petitioner a "screening examination" did not discover his true condition, particularly in view of the false answers in petitioner's application for employment, and the false answers given to Dr. Troup.

As above mentioned, petitioner was also employed by defendant as a section laborer in 1943 and in 1948. In his employment in 1943, petitioner earned $8.80 and quit work. In 1948, petitioner worked three hours and quit work (Tr. 1002-3).

Before petitioner was employed by defendant in 1943, he was examined by Dr. J. C. Gordon, respondent's Medical Examiner, and a record of this medical examination was offered in evidence as Defendant's Exhibit No. 8 (Tr. 721, R. 1682). In this examination petitioner denied that he had ever received an injury, although as shown above, he had been involved in an automobile accident *a year or two* prior to his exami-

nation by Dr. Gordon, and was complaining of this injury while in the Army in 1945 and in 1946. In fact, petitioner testified that this injury caused his discharge from the Army (Tr. 488).

Petitioner also denied to Dr. Gordon that he had ever had rheumatism. However, as above shown, petitioner admitted at the trial that he had suffered with rheumatism for several years, and his Army records, and the Veterans Administration records offered in evidence, showed clearly that petitioner had been afflicted with disabling rheumatism.

Petitioner also denied in this examination that he had ever had a "physical defect", although it is an admitted fact that he did have a severe spondylolisthesis. Petitioner did not deny that he gave such false answers to Dr. Gordon. However, he said he did not remember being examined by Dr. Gordon (Tr. 633-5).

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written application, which was introduced in evidence as Defendant's Exhibit No. 6 (Tr. 711, R. 1680). In this application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)".

In reply to this question petitioner stated that he had been employed by United States Coal and Coke Company, and Vera Pocahontas Coal Company, *but did not disclose that he had been in the Army in 1945 and 1946*, and did not disclose that he had been given a *medical discharge* from the Army on account of a severe spondylolisthesis, and had received a pension for this condition for many years. He also failed to

give the names of many former employers. In particular, he failed to state that he had been employed by Pocahontas Fuel Company for about one month, but had quit work "because of physical disability". See page 1 of Defendant's Exhibit No. 19 (Tr. 834-5, R. 1693).

In answer to question 10 in the 1948 Application, petitioner also denied that he had ever been injured. *In fact, he denied it three times.* We have heretofore shown that petitioner had been injured in an automobile accident in 1941, and that this answer was, therefore, false.

Before being accepted for employment by defendant in 1948, petitioner was also required to submit to a physical examination by Dr. Roy E. Christie, respondent's medical examiner, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7 (Tr. 718, R. 1681). In this examination —according to the card—petitioner denied that he had ever been *injured*, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (Tr. 709-11) that he *filled out*, and signed the Application for Employment in 1948, although he said that he did not *remember* making the Application for Employment dated September 27, 1948, and did not *remember* being examined for employment on September 27, 1948, or May 25, 1943 (Tr. 633-5, 709).

The three last mentioned exhibits were offered by respondent for the purpose of supporting respondent's contention that petitioner's employment by respondent in 1951 was procured by false and fraudulent

representations, and that the same false and fraudulent representations were made by petitioner in order to secure employment with respondent in 1948, and in 1943.

Although petitioner's Application for Employment dated July 24, 1951, Defendant's Exhibit No. 4, R. 1678—answer to question 10—showed that petitioner was employed by Peerless Coal Company from November, 1948, to July, 1951, and petitioner testified that he had no difficulty whatever in performing work for the various coal companies which had employed him (Tr. 492), it appears that on December 11, 1950, *about seven months prior to petitioner's employment by respondent*, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care. Defendant's Exhibit No. 14, Tr. 828, R. 1688. We quote from this application:

> "39. Brief History. In 1945 had trouble with back after maneuvers. Was given a brace by Army doctors to aid back trouble.
>
> 40. Symptoms. Severe (pain) in lower back region which totally disables patient for time being. Causes tremendous discomfort."

However, the Veterans Administration, on December 15, 1950, wrote petitioner as follows:

> "Your application for hospital care has been received and we regret to advise that the medical findings fail to show definite need of hospital treatment or domiciliary care. Defendant's Exhibit 15, Tr. 829, R. 1689.

It is true that petitioner testified that when he was examined by Dr. Troup on July 24, 1951, that Dr. Troup did not ask him any questions. However, peti-

tioner also testified on several occasions that he did not *remember* what he said to Dr. Troup, or what Dr. Troup said to him during this examination (Tr. 637, 703-8). The trial of this case took place approximately *eight years* following petitioner's examination by Dr. Troup and, aside from the improbability that petitioner would remember the conversation with Dr. Troup, petitioner repeatedly admitted that he had a very poor memory (Tr. 648, 725, 763). In fact, on one occasion petitioner testified "I can't hardly remember 1958". (Tr. 648).

Petitioner's poor memory was also demonstrated by his testimony to the effect that he did not remember whether he was *examined* when he was employed by respondent in 1943 and 1948 (Tr. 634-5), whether he was involved in an automobile accident in 1941, he being fifteen years of age at the time (Tr. 645), whether he was attempting to get in a Veterans hospital during the years 1948, 1949 or 1950 (Tr. 652), whether he was examined by Dr. Karl Weier for the Veterans Administration on November 4, 1947 (Tr. 648). Although petitioner had been examined by numerous doctors prior to July, 1951, his recollection pertaining to these examinations was most vague, and he remembered nothing that was done or said during said examinations.

In explaining why he stated, in answer to question No. 14 in his Application for Employment with respondent dated July 24, 1951 (Defendant's Exhibit No. 4, Tr. 641, R. 1678), that he had never been *injured*, petitioner said that he did not *remember* the accident in which he was involved in 1941; that his mother told him about the accident (Tr. 645-6). Then, when pressed on cross-examination petitioner said "I was well

when I went with the railroad * * * I wasn't hurting * * * nothing was bothering me (Tr. 646)."

In explaining his failure to correctly answer question No. 9 contained in his Application for Employment with respondent dated September 27, 1948 Defendant's Exhibit No. 6, (Tr. 711, R. 1680) pertaining to his previous employment and *military service*, petitioner said "I don't remember filling it out" (Tr. 713). However, when his attention was called to the fact that he had previously admitted filling out the Application and signing it, he said "I didn't know they wanted my life history when you get papers like that" (Tr. 714). "I didn't know they wanted my life history from birth up, because I don't know my life history" (Tr. 715). "I didn't think it was too important". (Tr. 715).

Petitioner advised Dr. Roy M. Hoover, his own physician, on May 15, 1959, that during his entire life he had had no previous difficulty with his back (Tr. 50, 85). Petitioner advised Dr. B. R. Kinter, his own physician, a short time prior to the trial of this case, that he had had no previous back disability (Tr. 180). Dr. Kinter inquired of petitioner if he had had any difficulty with his back piror to January 23, 1958, and petitioner *denied* that he had had any previous difficulty with his back (Tr. 180).

Petitioner was examined by Dr. W. Gayle Crutchfield, a neuro-surgeon of the University of Virginia Hospital at Charlottesville, Virginia, on August 19, 1959, and on that occasion petitioner advised Dr. Crutchfield that prior to January 23, 1958, he "had never had any trouble with his back or his leg". (Tr. 661).

A short time after petitioner's alleged injury, he went to Baltimore, Maryland, and was examined by Dr. Isaac Gutman, an orthopedic surgeon. We quote from a letter dated June 17, 1958, from Dr. Gutman to Bernard Savage, who was then representing petitioner, and which letter was admitted in evidence by agreement (Defendant's Exhibit No. 33, Tr. 1381, R. 1707):

> "According to (petitioner's) history, he was the epitome of health prior to his injury. He states that he was able to bend, twist, turn, do back flips and lift a couple of hundred pounds; *he had no previous difficulty of any kind with his back*" (Tr. 1380).

Subsequent to his alleged injury of January 23, 1958, petitioner was also examined by Dr. Richard Fisher, an orthopedic surgeon of Roanoke, Virginia, and on that occasion petitioner advised Dr. Fisher that he had had no previous difficulty with his back (Tr. 59).

On November 4, 1947, Dr. Karl E. Weier of Bluefield, West Virginia, examined petitioner for the Veterans Administration for the purpose of determining whether petitioner should be admitted to a Veterans hospital (Tr. 800). At that time petitioner was complaining of "low back disability" and other ailments. See testimony of Dr. Weier, Tr. 797-803. Also see Defendant's Exhibit No. 9, Tr. 803, R. 1683, which is a record of this examination. However, petitioner refused to admit that he had been examined by Dr. Weier in November, 1947, or at any other time. In fact, petitioner said that he did not know Dr. Weier (Tr. 647-8).

Petitioner not only misrepresented his previous back condition to practically every doctor who examined him, but also misrepresented such condition to his own attorney, as will appear from the transcript of the pre-

trial proceedings in this case (Tr. 1439, 1440), from which we quote:

> "Mr. Sanders, Sr.: Well, let me ask you a question. Do you claim he never had been previously injured in the back?
>
> Mr. Walter G. Burton: I sure do.
>
> Mr. Sanders, Sr.: You claim that?
>
> Mr. Walter G. Burton: I claim that he had never been to a doctor, that he worked in the coal mines, about his back; that he could go up these ladders with his arms and without using his legs or his back, that he could go up them, he was that strong. He could go up those ladders with his arms.
>
> Mr. Sanders, Sr.: You claim he never had any previous back injuries or previous back disabilities?
>
> Mr. Walter G. Burton: *That's right; and had never been to any physician about those matters.*"

In explaining why he did not advise his own attorney as to his previous back condition, petitioner said "my back wasn't hurting me". (Tr. 758).

Petitioner not only misrepresented his physical condition to the doctors who examined him, and to his own attorney, but actually carried his misrepresentations into the court room, and repeatedly *testified* that prior to his alleged injury of January 23, 1958, his back had never given him any "pain or discomfort" (Tr. 591-2, 756, 758, 779-80). He reiterated these misrepresentations on cross-examination (Tr. 779)

On page 5 of the Petition for Certiorari reference is made to the fact that the trial court permitted respondent to file its Special Plea No. 1, and its Amended Special Plea No. 1, although counsel for respondent had previously stipulated that at the time of his injury,

petitioner was respondent's employee, and was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The Court held that the stipulation did not preclude respondent from filing said Special Pleas (Tr. 14-16, 20-40, 1405-8). After the Court had held that the stipulation did not preclude respondent from filing said Special Pleas, petitioner's counsel announced that he did not wish to move for a continuance of the case, but that he was ready for trial (Tr. 27).

SUMMARY OF ARGUMENT

1. The only substantial question involved in this case is the sufficiency of the evidence to support the judgments of the lower courts. The decisions below are not in conflict with applicable decisions of this court construing the Federal Employers' Liability Act, but are in harmony therewith. There are no special and important reasons for granting certiorari, as the law governing this case is well settled. The question involved in this case—the sufficiency of the evidence to support the judgments of the lower courts—is important only to the parties involved.

2. The essence of the complaint against respondent—see page 4 of Amended Declaration—was that petitioner was riding on the brake step of an empty coal car, when a train of cars negligently and violently collided with the car on which petitioner was riding, causing petitioner to be *knocked off* of the car, and to *fall* many feet, and to strike, and *break* his back.

However, the evidence in the case establishes without conflict that the car on which petitioner was riding was drifting by gravity toward the west, followed by a train of sixty-nine empty cars, traveling at a speed

of approximtaely three or four miles per hour—the usual and customary speed. Although petitioner knew the train was following closely, he did not watch the train. The train gradually overtook and coupled to the car on which petitioner was riding. Petitioner was not knocked off of the car. He remained on the car until it stopped and then climbed down off of the car unassisted. He remained on the job until the end of his shift. He stated to certain of his fellow employees and to his attending physician, that he had injured his left thigh and leg, but did not complain to them that he had injured his back.

Although certain of petitioner's witnesses testified that the coupling was accompanied by a loud noise, and that the coupling was unusual, and there was a severe jerk, it is undenied that the train was traveling at a speed of from three to four miles per hour—the usual and customary rate of speed in coupling operations of this kind—when the coupling occurred, and that it was customary for brakemen to remain on the cars during such coupling operations. Respondent's rule permitted a moving car or train, while traveling at a speed of four miles per hour, to couple to a *standing* car.

In view of the fact that the train and the car on which petitioner was riding were traveling in the *same* direction, and that the speed of the train did not exceed three or four miles per hour, it is obvious that the impact of the coupling movement must have been slight indeed. This was a routine coupling operation and it could not have been anticipated that such an operation would have resulted in injury to petitioner or anyone else. Therefore, respondent was not negligent.

3. Petitioner had received a medical discharge from the United States Army in 1946, for a severe, second-degree spondylolisthesis which disabled him from performing effective military service, and had received a pension for his disability for over two years. Shortly after his discharge from the Army, petitioner had quit work for Pocahontas Fuel Company on account of physical disability. On December 11, 1950—seven months before applying to respondent for work as a yard brakeman—petitioner had applied to the Veterans Administration for hospital treatment, or domiciliary care.

Petitioner knew all of the foregoing facts on July 24, 1951, when he applied to respondent for work as a yard brakeman, but deliberately concealed these facts for the purpose of deceiving respondent.

According to the testimony of four doctors who examined petitioner following his alleged injury of January 23, 1958, a person with a severe spondylolisthesis such as petitioner had is physically unfit for employment as a yard brakeman, and no medical examiner would have been justified in approving him for such employment. There is no evidence to the contrary.

Relying upon the statements made by petitioner in his written application for employment, and to respondent's medical examiner, and having no reason to believe that the statements were false, respondent employed petitioner as a yard brakeman. However, had respondent known the true facts, it would not have employed petitioner. Respondent did not discover the falsity of said representations until after the institution of this action.

Petitioner's work record from July 1951, to January, 1958, indicates clearly that petitioner was disabled

from work several days in nearly every month of said period, which corroborates respondent's contention that petitioner was physically unfit for work as a yard brakeman.

There was a direct casual connection between petitioner's alleged injury and said false representations. If petitioner was injured, the only injury he received was an *aggravation* of a pre-existing spondylolisthesis. Had he not had this spondylolisthesis, the condition could not have been aggravated and there would have been no injury.

Petitioner's fraudulent conduct is established beyond all reasonable doubt. In fact, petitioner deliberately concealed his prior physical condition from his own attending physicians, and his own attorney. It is shown beyond doubt, that petitioner has a complete disregard for the truth and is unworthy of belief. Having obtained employment with respondent by fraud, petitioner is not entitled to maintain this action.

ARGUMENT

1. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT CONSTRUING THE FEDERAL EMPLOYERS' LIABILITY ACT

The only substantial question involved in this case is the sufficiency of the evidence to support the judgments of the lower courts. The decisions below are not in conflict with applicable decisions of this Court construing the Federal Employers' Liability Act, but are in harmony therewith. There are no special and important reasons for granting certiorari, as the law governing this case is well settled. The question involved in this case—the sufficiency of the evidence to support the judgments of the lower courts—is important only to the parties involved.

2. THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE JURY IN FINDING THAT RESPONDENT WAS NEGLIGENT

This point was not argued before, or considered by the Circuit Court of Mercer County, and that court expressed no opinion with reference to the sufficiency of the evidence to justify the jury in finding that respondent was negligent.

There is little, if any, dispute with reference to the facts and circumstances surrounding plaintiff's alleged injury. Petitioner and his fellow employees were engaged in breaking up and classifying a train of sixty-nine empty cars. The car on which plaintiff was riding was drifting slowly westward toward the shop track, followed by the train of empty cars. This was as planned, as it was not customary to stop the train as each car, or cut of cars, were cut off (Tr. 1009). The evidence does not indicate the speed of the car on which petitioner was riding, but the evidence shows without dispute that the *train* was traveling at a speed of three or four miles per hour—the usual and customary speed in coupling operations of this kind (Tr. 281-2, 348-9, 1008-9). Harry S. Manns, Jr., one of petitioner's witnesses, referred to the movement of the cars as a "routine switching operation" (Tr. 348). Petitioner was on the brake step of the car in question when it was "cut off" by brakeman George A. Saunders, Jr. When the car was cut off it drifted toward the west and away from the train from which it had been cut off (Tr. 367, 519, 524). Petitioner admitted that after his car was cut off, and started moving west, that he did not continue to watch the train, although he knew that the train was moving in a westerly direction when the car was cut off, and knew that the train was following him (Tr. 517, 735-7, 739, 740-3). Petitioner's witness, George A. Saunders, Jr., who had cut the car off to

petitioner, testified that "the train followed it (the car) and *gradually* caught up with it (Tr. 375). This is not contradicted. Petitioner's witness, Harry S. Manns, Jr., observed the train overtaking the car on which petitioner was riding, and ran to the car to prevent it from coupling. However, Manns did not reach the car in time to prevent the coupling. It did not occur to Harry Manns, Jr. that petitioner was in any danger, but Manns knew that if the train coupled to the car, that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (Tr. 530-3).

Conductor T. A. Taylor, Jr. also observed the train overtaking the car on which petitioner was riding and it did not occur to Conductor Taylor that petitioner was in any danger. Taylor was primarily concerned with preventing the coupling which would have delayed the movement of the train (Tr. 1010-1018).

As above mentioned, petitioner observed the train following him, after his car had been cut off, and he would not deny that the train was moving *slowly* just prior to the coupling (Tr. 737). However, the train caught up with the car on which petitioner was riding and coupled to it. When the train stopped, petitioner climbed down from the car *unassisted* (Tr. 1014-15).

It further appears from the evidence that after the car in question was cut off to petitioner, it traveled only about three or three and one-half car lengths before the train overtook, and coupled to it (Tr. 523). The distance separating the train from the car was never more than from ten to fifteen feet (Tr. 229-231).

It further appeared from the evidence that respondent's rules permitted a train traveling at a speed of

four miles per hour to couple to a *standing* car. However, the car on which petitioner was riding was not a *standing* car. It was moving in the same direction, and *away* from the overtaking train.

It is quite true that several of petitioner's witnesses testified that the collision made a loud noise, or caused a severe jerk, or was unusual. However, the fact remains that this was a routine coupling operation which should not have resulted in injury to the petitioner or anyone else, and it is doubtful whether petitioner, in fact, sustained any injury whatever.

Petitioner would have the Court believe that the "effect of the accident was to separate and dislocate petitioner's spinal column"—see Petition for Certiorari, page 4. However, Harry S. Manns, Jr. and Orrin K. Trigg, two of petitioner's witnesses, testified that immediately following the alleged accident, that petitioner was complaining that he had injured his *hip* and *leg*. Petitioner did not complain of injury to his *back* (Tr. 221, 344). Then, too, the day following his alleged injury, petitioner was examined by Dr. D. L. Hosmer, an orthopedic surgeon, and on that occasion petitioner did not complain to Dr. Hosmer of his *back*. The only complaint petitioner made to Dr. Hosmer was with reference to pain in his left hip and left thigh. Dr. Hosmer stripped petitioner and examined him, but said that his records did not indictae that he found any bruises, wounds, contusions or lacerations on petitioner's body (Tr. 1257-1260).

If, as petitioner contends, the "effect of the accident was to separate and dislocate petitioner's spinal column", then it is obvious that this injury would have immediately caused excruciating pain and would have completely disabled petitioner. This seems obvious

without medical testimony. However, Dr. D. L. Hosmer testified that if the accident in question caused, or substantially aggravated petitioner's spondylolisthesis, that he would have felt immediate pain in the back and would probably have been disabled (Tr. 1268-9, 1274). To the same effect, see testimony of Dr. W. Gayle Crutchfield (Tr. 673).

If the train in question was traveling at a speed of from three to four miles per hour—and there is no evidence to the contrary—and the car on which petitioner was riding was moving in the same direction as the train, then it is obvious that the impact of the coupling must have been slight indeed. Certainly, if the train was traveling not over three or four miles per hour, and the car on which petitioner was riding was moving in the same direction, and away, from the train, then it is inconceivable how the coupling could have injured petitioner.

When petitioner's car was cut off and started drifting westward, it was thought that the car would exceed the speed of the following train and that there would be no recoupling. However, for some unknown reason, the train overtook and coupled to the car. This recoupling could be explained by the fact that petitioner, while drifting toward the shop track, applied the brake on his car too tightly, and thus caused the car to slow up and be overtaken by the following train. Petitioner *admitted* that he did apply the brake, and it seems clear that petitioner was actually applying the brake when the coupling took place. See petitioner's testimony Tr. 510, 738. The application of the brake by petitioner appeared to Conductor T. A. Taylor, Jr. as a logical explanation for the recoupling (Tr. 1038).

3. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

(a) Petitioner Was Not Physically Fit for Work as a Yard Brakeman. No Medical Examiner Would Have Been Justified in Approving Petitioner for Such Employment

Due to the strenuous nature of a yard brakeman's work, the physical qualifications for such work were considered by respondent to be the highest of any of its employees (Tr. 1216-17, 1226).

The evidence showed clearly and conclusively that on January 31, 1946, petitioner was discharged from the United States Army for the reason that he had a severe, second-degree, spondylolisthesis, manifested by chronic pain in the lower back, and that he could not be rehabilitated to perform effective military service. See petitioner's Certificate of Disability for Discharge, Defendant's Exhibit No. 12, Tr. 821, R. 1686.

For confirmation of the diagnosis made by the Army doctors when petitioner was given a disability discharge, see

Defendant's Exhibit No. 13, Tr. 824, R. 1687

Defendant's Exhibit No. 14, Tr. 828, R. 1688

Defendant's Exhibit No. 17, Tr. 832, R. 1691

Defendant's Exhibit No. 18, Tr. 833, R. 1692, pages 5, 6, 8 and 9

Defendant's Exhibit No. 19, Tr. 834-5, R. 1693, pages 1 and 7

Defendant's Exhibit No. 20, Tr. 836, R. 1694

Defendant's Exhibit No. 23, Tr. 839, R. 1697

Some of these exhibits show that since 1941 petitioner had suffered with seriously disabling rheumatism, and a seriously disabling personal injury. See:

Defendant's Exhibit No. 13, Tr. 824, R. 1687

Defendant's Exhibit No. 18, Tr. 833, R. 1692, pages 1 and 3

Defendant's Exhibit No. 20, Tr. 836, R. 1694, page 1

We quote from Defendant's Exhibit No. 20, Tr. 836, R. 1694;

> "HISTORY: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1943 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage."

The above mentioned HISTORY given by petitioner to the Veterans Administration doctor, shows conclusively that petitioner then knew that he had received a medical discharge from the Army in January 1946.

We quote from Defendant's Exhibit No. 18, Tr. 833, R. 1692, first page:

> "In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees and back. Heart flutter. Since this time has had intermittent back pain, made worse with wet, cold weather. Long periods of standing or walking or carrying wts. will cause pain.

Complete physical examination is negative except for the following:

In 1941, in automobile accident acquired painful back, had to sleep in special position on abdomen for 3 mon. because of pain."

We also quote from VETERANS APPLICATION FOR PENSION OR COMPENSATION filed by petitioner with the Veterans Administration in February, 1946:

"2 Nature of disease or injury on account of which claim is made and date each began.

Heart flutters, rheumatism in my back and where my bones join together (last part of 1942). Pains in my right side, come from where I had my ribs broken (last of 1941). Has got bad since I have been in the Army." (Tr. 824, R. 1687)

Petitioner testified repeatedly that the injuries which he received to his side in 1941 caused his discharge from the Army (Tr. 614, 619, 622-4, 625).

In testifying with reference to his rheumatism, petitioner said:

"When I had rheumatism I hurt all over. Everything hurt. I couldn't hardly stand to look at daylight; it hurt that bad" (Tr. 760).

* * * "A. I had this rheumatic fever and it was pretty bad when I had it. I don't remember.

Q. 551. It was bad in your back, too, wasn't it?

A. It wasn't bad in my back; it was bad all over.

Q. 552. But you had it in your back, too, didn't you?

A. I had it all over.

Q. 553. But you had it in your back, too, didn't you?

A. I had it all over. That's in my legs and arms and all over.

Q. 554. And back?
A. All over.
Q. 555. You hate to say back, don't you?
A. I had it all over.
Q. 556. All right. You just won't say you had it in your back?
A. My back is part of me, and I had it all over.
Q. 557. But you did say you had it in your back in your application, didn't you?
A. I don't remember." Tr. 728-9.

Dr. Harold Troup (Tr. 1230-4), Dr. W. Gayle Crutchfield (Tr. 671-2), Dr. Roy M. Hoover (Tr. 68-9, 91-2), and Dr. Richard Fisher (Tr. 855) testified in substance that a person with a severe spondylolisthesis such as petitioner had was *unfit* for employment as a yard brakeman, and that a medical examiner would not be justified in approving petitioner for such employment.

We quote from the testimony of petitioner's witness, Dr. Roy M. Hoover:

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a smyptomatic *one even in the ordinary activities of braking, not with any accident at all.*" Tr. 92.
> * * *
> "A. The thing I am stating is this: that if in a pre-employment examination of an individual who is having no symptoms, if I saw X-rays like this, I would advise against employing that man as a yard brakeman because of the danger of getting a painful back out of it." Tr. 92.

It, therefore, clearly appears that petitioner, on July 24, 1951, was *unfit* for work as a yard brakeman, and

that no medical examiner would have been justified in approving him for such employment. So far as the evidence shows, there was no shortage of yard brakemen at that time, and no reason appears why Dr. Troup would have approved petitioner for employment as a yard brakeman if he had known the the true facts.

Petitioner's WORK RECORD for the period July 24, 1951, to January 23, 1958—Defendant's Exhibit No. 29 (Tr. 1068, R. 1703) strongly corrobortaes our contention that on July 24, 1951, petitioner was *unfit* for employment as a yard brakeman. This WORK RECORD shows that hardly a month passed during the period July 24, 1951, to January 23, 1958, that petitioner was not off from work for several days on account of "sickness", or other unexplained absences. Certainly no physically fit employee would have lost as much time from work on account of "sickness", and other unexplained absences, as petitioner lost. Petitioner, in attempting to impress the jury that he was physically fit, *denied* that he had ever lost any time from work on account of sickness (Tr. 731-2). This testimony was, of course, completely false.

(b) Petitioner Knew That He Had Received a Medical Discharge From the Army, for Spondylolisthesis; and Knew That He Had Been Seriously Disabled With Rheumatism and by a Personal Injury

Petitioner was inducted into the United States Army on July 18, 1945, and was discharged on January 31, 1946. He received a Certificate of Disability for Discharge, which is commonly known as a disability or medical discharge. This much is entirely clear.

It is equally clear that petitioner *knew* on July 24, 1951, when he was examined by respondent's medical

examiner, that he had received a medical discharge. We quote from petitioner's testimony:

"Q. 8. When were you in the Army?
A. I went to the Army July 18, 1945.
Q. 9. And when did you get out?
A. I got out January 31st, 1946.
Q. 10. What type of discharge did you receive?
A. C.D.D.
Q. 11. What does that mean?
A. It's a Certificate of Disability for Discharge.
Q. 12. Was it an honorable discharge?
A. Yes, sir.
Q. 13. Why did you get a military discharge, if you know?
A. I had trouble with my side.
Q. 14. With your side?
A. Yes, sir." Tr. 487-488.

"Q. 184. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?
A. Yes, sir.
Q. 185. After you got out of Camp Beale?
A. Yes, sir.
Q. 186. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge, didn't they?
A. Yes, sir." Tr. 619-620.

"Q. 370. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?
A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check, or something. They tell me about it in the Army. I don't know." Tr. 648-649.

It also appears that on March 29, 1948, petitioner was examined by a Veterans Administration physician and that he gave the examiner the following history:

"Sometime later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness *in the lower spine*, and in the right rib cage." See Defendant's Exhibit No. 20, Tr. 836, R. 1694.

We wish to emphasize the fact that petitioner testified (Tr. 488) that he received his discharge by reason of the trouble with his *side*.

Therefore, it is quite clear from the above mentioned exhibits, and petitioner's testimony that when he was examined by respondent's medical examiner on July 24, 1951, petitioner *knew* that he had served approximately six months in the Army and had received a medical discharge; and knew exactly why he had received this medical discharge. He also knew full well that he had suffered for many years with very disabling rheumatism, and with a disabling personal injury. As above shown, he attributed his discharge from the Army to this personal injury. No one except the most gullible could possibly believe that the petitioner was unaware of these facts when he applied for employment with respondent on July 24, 1951.

(c) Petitioner Fraudulently Concealed From Respondent's Medical Examiner His Past Military Service and Medical Discharge; and That He Had Been Seriously Disabled With a Spondylolisthesis, Rheumatism, and a Personal Injury

On July 24, 1951, petitioner, *without assistance*, filled out and signed an application for employment as a yard brakeman. Defendant's Exhibit No. 4, Tr. 641, R. 1678.

According to this Application, petitioner had been through grade school, and two years of high school.

He had attended vocational school for twenty months (Tr. 599).

The application was filed by petitioner with Frank J. Allen, a clerk in the office of the Terminal Train Master at Bluefield, West Virginia (Tr. 1060). Allen gave petitioner the application form, and, according to respondent's rule, required petitioner to fill out, and sign, the application (Tr. 1060-1).

Thereupon petitioner delivered the application to Dr. Troup, respondent's medical examiner, at Bluefield, and was examined by Dr. Troup. Dr. Troup interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708, R. 1679). Dr. Troup, relying upon the answers given by petitioner, approved petitioner for employment by respondent as a yard brakeman (Tr. 235).

Dr. Troup testified that due to the lapse of time since he had examined petitioner—approximately eight years—that he had no independent recollection of examining petitioner, and had to rely on his record—the physical examination card above referred to. However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner, and that this custom and practice required him to strip petitioner and examine him separate and apart from other applicants, and to require petitioner to answer the questions contained in the physical examination card (Tr. 1222, 1227-9).

Petitioner's application for employment—Defendant's Exhibit No. 4 (Tr. 641, R. 1678)—contains the following question:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of one employer—Peerless Coal Company, Vivian, West Virginia—and stated that he had been employed by Peerless from November, 1948, to July, 1951.

The evidence shows without conflict, however, that in addition to Peerless Coal Company, petitioner had been employed by Pocahontas Fuel Company, Koppers Coal Company, Vera Pocahontas Coal Company, United States Coal and Coke Company, and Winding Gulf Collieries Company. It further appears that petitioner had also been employed by the respondent in 1943 and 1948, but on both occasions had walked off of the job after a few hours' work. It further appeared that petitioner was employed by Pocahontas Fuel Company about one month, and quit because of "physical disability". Defendant's Exhibit No. 19 (Tr. 834-5, R. 1693).

Had petitioner disclosed his employment by Pocahontas Fuel Company and his employment by respondent in 1943 and 1948, it is extremely doubtful whether petitioner would have been employed by respondent on July 24, 1951. Petitioner realized this and deliberately concealed his employment with Pocahontas Fuel Company and the other coal companies, and his two previous employments by respondent.

The application signed by petitioner—Defendant's Exhibit No. 4 (Tr. 641, R. 1678)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, or given a medical discharge".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

Having filled in all of the answers to the questions contained in this Application, petitioner necessarily *read* the words "or given a medical discharge". Petitioner did not testify that he did not read and understand the words "or given a medical discharge", and he did not testify that he did not understand what a "medical discharge" was.

To the contrary, petitioner *knew*, as we have heretofore pointed out, that he had received a medical discharge from the Army. Petitioner knew, of course, that if he had informed respondent that he had received a medical discharge from the Army, and that he had received a pension until the summer of 1948, that his Application would not have been approved. Therefore, petitioner told a ***half*** truth and answered "U. S. Army. Honorable Discharged".

Question 14 of the Application for Employment (Defendant's Exhibit No. 4 (Tr. 641, R. 1678) and the answer thereto, read as follows:

> "14. Have you ever been injured? If so, when and at what place. No."

This answer was completely false. Petitioner was admittedly injured in 1941, and he testified that this

injury was the cause of his discharge from the Army (Tr. 488).

During the course of his cross-examination, petitioner denied personal knowledge of the 1941 automobile accident and his resulting personal injuries, and said that his mother had told him about the accident (Tr. 645). However, when petitioner was forced to admit that he had received personal injuries in the 1941 automobile accident, he finally explained that the reason he did not disclose this injury in the Application in question, was that he "wasn't hurting"; that "nothing was bothering" him at the time (Tr. 646).

We have previously pointed out (Tr. 756, 1439, 1440) that petitioner concealed from his own attorney the fact that he had had trouble with his back prior to his alleged injury of January 23, 1958. In explaining why he had concealed his previous low back condition from his own attorneys, petitioner said: "my back wasn't hurting me" (Tr. 758).

The fact that petitioner was not "hurting" and that "nothing was bothering" him, when he applied to respondent for employment, did not justify him in falsely stating in answer to question 14 of the Application that he had never been injured. Explanations of this kind are not sufficient to justify or excuse willful and deliberate misrepresentations. Had petitioner truthfully answered question 14 in the Application, then it seems most logical to assume that further questions, truthfully answered by petitioner, would have disclosed that petitioner was physically unfit for employment as a yard brakeman, and he would not have been so employed.

The Physical Examination card prepared by Dr. Troup, respondent's medical examiner, on July 24,

1951, Defendant's Exhibit No. 5 (Tr. 708, R. 1679), contained the following questions and answers:

> "Have you ever had:
> Rheumatism? No.
> A medical discharge from the military service? No. (Honorable).
> Have you ever had a long or serious illness? No.
> What injuries have you ever received? No.
> Have you ever had tumor, ulcer, physical defect, or been operated upon? No."

As heretofore clearly shown, all of the foregoing answers were completely false, and petitioner *knew* they were false when he gave them.

Petitioner, of course, realized the materiality and seriousness of these false answers, and was finally driven to the denial that Dr. Troup had asked him any of the questions appearing on the Physical Examination card (Tr. 704).

Petitioner went so far (Tr. 637) as to say that he and several other applicants for work were stripped and examined by Dr. Troup at the same time (Tr. 637). However, other portions of petitioner's testimony disclose rather clearly that petitioner did not *remember* what Dr. Troup said to him, or what he said to Dr. Troup during this examination (Tr. 637, 703-8).

We quote from petitioner's testimony:

> "Q. 435. I asked you this morning about when Dr. Troup examined you, and you said at that time you didn't remember what he said to you or what you said to him, didn't you?
> A. You said while he was examining me, what did he say to me. *I don't remember.* But you have got some questions with "No" there I don't know anything about.

Q. 436. Now, I understand you to say when Dr. Troup examined you on July 24th, 1951, he didn't ask you one single question. Is that your reply?

A. I didn't set up and talk to Dr. Troup and answer those questions on that paper there.

Q. 437. What questions?

A. *Whatever you've got there.*

Q. 438. Did he ask you any questions at all? Did he say anything to you?

A. He examined us and give us this—look at these different lights, and things like that, and he examined us, and we signed some papers and went to the Yard Office.

Q. 439. Did he ask you any questions?

A. *We talked.* We wasn't in there in silence as he examined me.

Q. 440. What did you talk about, you and Dr. Troup?

A. What did we talk about?

Q. 441. Yes. What did you talk about?

A. Just talk.

Q. 442. What was said? What did he say to you and what did you say to him?

A. The main thing the doctor was doing was examining us. And we signed some papers and went down and marked up for work." (Tr. 706-7).

"Q. 445. I am not asking you about that. You said when you went down and you were examined by Dr. Troup, that you talked to Dr. Troup. Did you say that?

A. I talked with Dr. Troup. You don't walk into a doctor's office and not say, "Good Morning," or "Good evening," or anything; you say something.

Q. 446. What I am trying to get, if you remember, what did you say to Dr. Troup and what did he say to you?

A. Word for word, our conversation while I was in there?

"Q. 447. Yes.

A. I wouldn't know. He didn't have that paper asking any questions, if that's what you mean, and I answered it." Tr. 707-8).

We desire again to emphasize that this case was tried in October 1959—nearly *eight years* after petitioner was examined by Dr. Troup. Petitioner *passed* the examination and was given employment. Apparently nothing occurred during this examination which would cause petitioner to remember the conversation he had with Dr. Troup. Petitioner admitted repeatedly that his memory was poor (Tr. 648, 725, 763) and on one occasion said "I can't hardly remember 1958". Tr. 678).

Petitioner's admissions that his memory was very poor, are strongly corroborated by the fact that during his testimony petitioner frequently failed to remember many vital and material matters, which any person with a normal memory would have remembered. Furthermore, no reason appears why Dr. Troup would be so derelict in his duty that he would fail to ask petition any of the questions appearing on the Physical Examination card. Dr. Troup testified that he had no independent recollection of examining petitioner, and had to rely on his record—the Physical Examination card—Defendant's Exhibit No. 5 (Tr. 708, R. 1679). However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner and that this custom and practice, and respondent's rule, required him to strip petitioner and examine him separate and apart from the other applicants, and to require petitioner to answer the questions contained in said Physical Examination card.

We, therefore, submit that petitioner's testimony to the effect that Dr. Troup examined petitioner and

several other applicants in the same room and at the same time, and that Dr. Troup did not ask petitioner or the other applicants any of the questions appearing on the Physical Examination card, is so highly improbable, so inconsistent with other portions of petitioner's testimony, and so manifestly false, that no reasonably intelligent man could give credence to such testimony. The testimony is *incredible* as a matter of law, and the rule is well settled that incredible testimony should be disregarded.

And, finally, in connection with this phase of the case, we desire to again call the Court's attention to the fact that on December 11, 1950, about seven months prior to petitioner's last employment by respondent, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care. Defendant's Exhibit No. 14 (Tr. 828, R. 1688). Certainly petitioner, as bad as his memory is, could not have forgotten on July 24, 1951, that, seven months previously, he had filed said Application for Hospital Treatment or Domiciliary Care.

(d) Petitioner Also Fraudulently Procured Employment With Respondent in 1943 and 1948

Strongly supporting respondent's contention that petitioner fraudulently procured employment with respondent on July 24, 1951, is the clearly established fact that petitioner also fraudulently procured employment with respondent in 1943 and 1951.

Before petitioner was employed by respondent in 1943, he was examined by Dr. J. C. Gordon, respondent's medical examiner, and a record of this medical examination was offered in evidence as De-

fendant's Exhibit No. 8 (Tr. 721, R. 1682). In this examination petitioner denied that he had ever received an injury, that he had ever had rheumatism, or that he had ever had a "physical defect". As above shown, all of these answers were false. In fact, the automobile accident in which petitioner was injured and which he claimed caused his discharge from the Army (Tr. 488) occurred in 1941, just *two years* prior to his examination by Dr. Gordon. No one could possibly believe that petitioner had forgotten this automobile accident, and his resulting injuries, when he was examined by Dr. Gordon.

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written Application, which was introduced in evidence as Defendant's Exhibit No. 6 (Tr. 711, R. 1680). In this Application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)."

In reply to this question petitioner stated that he had been employed by United States Coal and Coke Company, and Vera Pocahontas Coal Company, but did not disclose that he had been in the Army in 1945 and 1946, and that he had been given a medical discharge from the Army on account of a severe spondylolisthesis, and had received a pension for this condition for over two years.

In explaining his failure to correctly answer question No. 9 contained in his Application for Employment with respondent, dated September 27, 1948, Defendant's Exhibit No. 6 (Tr. 711, R. 1680), pertaining to his previous employment and military service, petitioner said, "I don't remember filling it

out" (Tr. 713). However, when his attention was called to the fact that he had previously admitted filling out the Application, and signing it, he said "I didn't know they wanted my life history when you get papers like that" (Tr. 714). "I didn't know they wanted my life history from birth up, because I don't know my life history" (Tr. 715). "I didn't think it was too important" (Tr. 715).

Before being accepted for employment by defendant in 1948, petitioner was also required to submit to a physical examination by Dr. Roy E. Christie, respondent's medical examiner, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7, (Tr. 718, R. 1681). In this examination—according to the card which was signed by petitioner—petitioner denied that he had ever been *injured*, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (Tr. 709-11) that he filled out, and signed, the Application for Employment in 1948, although he said that he did not *remember* making this Application. He also did not remember being examined for employment on September 27, 1948, or May 25, 1943 (Tr. 633-5, 709). However, he did not deny these examinations.

The fact that petitioner made false representations to respondent in obtaining employment in 1943 and 1948, strongly corroborates respondent's contention that petitioner fraudulently obtained employment in 1951.

(e) If Dr. Troup, Respondent's Medical Examiner, Had Known the Truth Concerning Petitioner's Military Service and Medical Discharge; and His Severe Spondylolisthesis, Rheumatism, and Personal Injury, He Would Not Have Recommended Petitioner for Employment

It would be preposterous to assume that Dr. Troup would have recommended petitioner for employment as a yard brakeman, or that petitioner would have been so employed, if petitioner had truthfully answered the questions in his Application for Employment, and had made truthful answers to Dr. Troup.

Dr. Troup testified that if when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, illnesses and disabilities, and his Army service and medical discharge, that he would not have recommended petitioner for employment as a yard brakeman (Tr. 1230-5), and that petitioner would not have been so employed (Tr. 1244-5). If Dr. Troup, *knowing* the truth about petitioner, had recommended petitioner for employment as a yard brakeman, then Dr. Troup would have been guilty of a gross violation of his duty to respondent. Certainly no experienced medical examiner would have approved petitioner for work as a yard brakeman, or for other strenuous work, for the obvious reason that petitioner's condition could quite easily be aggravated, and claims for damages could naturally be expected.

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe

spondylolisthesis is easily injured (Tr. 91-2, 671-2, 855, 1230-4).

On page 7 of the Petition for Certiorari, it is said, "since petitioner's spondylolisthesis was readily discoverable on medical examination, respondent's physician either failed to see what was readily apparent or chose to ignore it".

We disagree with this statement. Dr. Troup testified that he gave petitioner a "screening examination" (Tr. 1226, 1246), and that he did not discover petitioner's condition. It also appears that petitioner had taken, and *passed*, numerous physical examinations prior to his examination by Dr. Troup, and apparently none of these examining physicians discovered petitioner's condition. Petitioner was examined before being inducted into the Army (Tr. 604). He was examined by Dr. D. L. Hosmer on the day following his alleged injury, but Dr. Hosmer did not discover, spondylolisthesis (Tr. 1257-9). Petitioner also passed physical examinations for employment with Peerless Coal and Coke Company (Tr. 489-90), Vera Pocahontas Coal Company (Tr. 601-3), Pocahontas Fuel Company (Tr. 627-8), United States Coal and Coke Company (Tr. 12-13), Koppers Coal Company (Tr. 628), and Winding Gulf Collieries Company (Tr. 630-1). In addition to this, petitioner was examined by respondent's medical examiners in 1943, and 1948. None of these doctors discovered petitioner's spondylolisthesis. Therefore, it is understandable why Dr. Troup, in giving petitioner a "screening examination", did not discover his true condition, particularly in view of the false answers in petitioner's Application for Employment, and the false answers given to Dr. Troup.

(f) There Was a Direct Causal Connection Between Petitioner's False Representations and His Alleged Injuries

The evidence is clear that when petitioner was employed by respondent on July 24, 1951, that he had a severe, second-degree spondylolisthesis, and that he had received a medical discharge for this condition, and a pension for approximately two years.

We quote from page 9 of Defendant's Exhibit No. 18 (Tr. 833, R. 1692):

> "RADIOLOGIC RECORD
>
> The 5th lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to ½ of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis."

Dr. W. Gayle Crutchfield, who was head of the Department of Neuro-surgery at the University of Virginia Hospital, Charlottesville, Virginia, testified (Tr. 678-9) that the condition shown in the above mentioned X-ray report was *essentially* the same as petitioner had at the time of the trial. There is no evidence to the contrary.

Therefore, it is apparent that the only injury which petitioner could have sustained in the alleged accident, was an aggravation of his pre-existing spondylolisthesis.

For many reasons heretofore pointed out, it is questionable whether petitioner sustained any injury. The train which coupled to the car on which petitioner was riding was traveling at a speed of from three to four miles per hour—the usual and customary speed. The car on which petitioner was riding was gradually overtaken and coupled to by the train. When the train stopped, petitioner climbed down off of the

car unassisted. He complained of his hip and leg to his fellow employees, Trigg and Manns (Tr. 221, 344), but he did not complain of his *back*. The following day petitioner was examined by Dr. D. L. Hosmer and he did not then complain of his *back* to Dr. Hosmer (Tr. 1264-5). Therefore, if petitioner was actually injured, the injury must have been slight indeed, and probably would not have produced any disability, but for the pre-existing spondylolisthesis.

Therefore, it seems clear that there was a direct causal connection between petitioner's false representations and his alleged injury. This conclusion is borne out by the testimony of Dr. Roy M. Hoover, a witness for petitioner (Tr. 92):

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic *one even in the ordinary activities of braking, not with any accident at all.*
>
> * * *
>
> "A. The thing I am stating is this: that if in a pre-employment examination of an individual who is having no symptoms, if I saw X-rays like this, I would advise against employing that man as a yard brakeman because of the danger of getting a painful back out of it."

Therefore, we submit that the trial court was clearly right when he said (Tr. 1419-20), "I can't imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case."

THE LAW GOVERNING THE CASE

The trial court in directing a verdict in favor of respondent, relied principally upon the case of *Minneapolis, St. Paul & S.S.M. Ry. Co.* v. *Rock*, 279 U.S. 410, 73 L. Ed. 766. We submit that the *Rock* case is clearly in point and supports the judgment of the trial court.

The court, in the course of its opinion in the *Rock* case, said:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.
>
> * * *
>
> "Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means.

> While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and *physical condition* to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and it other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

The facts in the *Rock* case, and in the case now under consideration are different, but the principle involved in both cases is exactly the same.

In the *Rock* case the plaintiff perpetrated a fraud on the railway company by having another person impersonate him and in his place to submit to the required examination. In the case now under consideration, petitioner himself submitted to the examination, but in his Application for Employment, and in reply to questions by respondent's medical examiner, he made false answers with reference to his Army service, medical discharge, physical condition, illnesses and accidents. These fraudulent representations deceived respondent and enabled petitioner to secure employment with respondent.

The only difference between the *Rock* case and the case now under consideration is the *type of fraud* perpetrated. In both cases the employees obtained their employment by fraud.

In fact, the case now under consideration is even stronger in favor of the employer than the *Rock* case, in view of the fact that in the *Rock* case there was no connection whatever between the employee's fraudulent conduct and the *accident*, or the employee's *injuries*, whereas in the case now under consideration, there was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

The Petition for Certiorari refers to the case of *Minneapolis, St. P. & S. S. M. R. Co.* v. *Borum*, 286 U.S. 447, 76 L. Ed. 1218, and says, page 14:

> "In Borum, the same railroad attempted to extend the principle of the Rock case to a very different fact situation—one strikingly similar to that involved here. This Court squarely rejected the attempt and made clear how limited is any rule to be derived from the Rock case.

However, the *Borum* case is not "strikingly similar" to the case here involved. In fact, it is entirely different, as will be seen from the following exerpts from the Court's opinion:

> "It was a general practice of men, over the age specified in the rule, when applying for such work on the railroads of defendant and other carriers in the Northwest falsely to represent their ages to be within the specified limit, and that practice was known to the defendant. The arbitrators were unable to find whether defendant knew plaintiff was over 45 years. They did not find, nor does the evidence require a finding, that defendant was deceived by plaintiff's false statements or that it accepted his application because of or in reliance upon them. The application was not rejected within 30 days and, under rule 22, must be deemed to have been finally accepted. Under the terms of the contract of hiring, defendant did not

without more have the right to remove plaintiff from its service on account of such misrepresentation."

* * *

"Neither his age nor his physical condition contributed to cause his *injury*."

(In fact, his age did not contribute to either the *injury or the accident*.)

* * *

"Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condtion it required. The arbitrators did not find, and the evidence does not show, that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition or that, if he had given his real age, the surgeon would have found otherwise."

* * *

"Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees."

In the case now under consideration it clearly appears that

(1) the representations made by petitioner were material, and false. They were known to be false by petitioner and were made for the purpose of deceiving respondent;

(2) It was not the general practice of respondent's employees to make such false representations and, of course, respondent had no knowledge of any such practice, neither did respondent have knowledge of the falsity of petitioner's representations;

(3) Respondent was deceived by the false representations. Had it known the truth concerning petitioner, it would not have employed petitioner. Petitioner's fraud was a substantial factor in the hiring;

(4) Petitioner's physical condition was such as to make his employment inconsistent with respondent's proper policy and its reasonable rules to insure discharge of its duty to select fit employees;

(5) Respondent had the right to dismiss petitioner from its service at any time for such false representations—Defendant's Exhibit No. 4 (Tr. 641, R. 1678).

(6) There was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

For the foregoing reasons it is entirely clear that the *Borum* case has no application whatever to the case now under consideration and does not indicate in any way that the judgments of the lower courts were erroneous.

In the case of *Casso* v. *Pennsylvania Railroad Company* (C.C.A. 3rd Cir.), 219 F. 2d 303, the Court held:

> "One who has procured his employment by fraud may not recover (under Federal Employers' Liability Act) providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Southern Pacific Co.* v. *Libbey* (C.C.A. 9th Cir.), 199 F. 2d 341, the Court said, page 348:

> "It is not questioned by either side that one who procures his employment by fraud is not entitled to the benefits of the Employers Liability Act * * * providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Eresafe* v. *New York N. H. & H. R. Co.* (C.C.A. 2d Cir.), 250 F. 2d 619, the Court said, page 622:

> "A humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent *injury* to the employee, before any defense of fraud can be considered as a bar to a recovery."

In the case of *Talarowski* v. *Pennsylvania R. Co.* (D.C. Del.), 135 F. Supp., 503, the Court held that an employee is not entitled to maintain an action under the Federal Employers' Liability Act where his employment has been procured by fraudulent statements made in the application for employment, if the statements are relied upon, and are of such a character as to have been a substantial factor in the hiring.

In the case of *Matthews* v. *Atcheson T. & S. F. R. Co.* (Cal.), 129 P. 2d 435, the Court said, page 440:

> "The concealment does not vitiate the contract of employment and prevent recovery, unless there is shown to be a causal connection between the *injury* (not accident) and the misrepresentations in the application for employment."

To the same effect, see *White* v. *Thompson* (Kan.), 312 P. 2d 612.

The Petition for Certiorari, pages 14-15, takes the position that before respondent can avoid liability for petitioner's alleged injuries, on the ground of false representations, that it must be shown that there was a direct causal connection between the false representations and the alleged *accident*. We do not so understand the law. Certainly none of the above mentioned cases so hold. It would be most illogical to hold that respondent could not defend on the ground of such false representations, without showing a direct causal connection between the false representations and the *accident*, when it clearly appears that there was a direct causal connection between such false representations and the *injuries* alleged to have been sustained.

In determining whether this case should have been submitted to the jury, the test seems to be whether, the jury could "with reason" have found the issues in favor of petitioner. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 1 L. Ed. 2d 493.

> "Where the evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Gunning v. *Cooley*, 281 U.S. 90, 74 L. Ed. 720.

> "As to the second category, although the statements concerning directed verdicts are often extremely ambiguous, a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, points so strongly

in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

Moore's Federal Practice, Volume 5, page 2314.

We respectfully submit that the facts herein, and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of respondent, that reasonable men could not possibly come to contrary conclusions, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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